

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT for SUFFOLK COUNTY

No. _____

AT&T COMMUNICATIONS OF NEW ENGLAND, INC.,
Appellant,

v.

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY,
Appellee.

ON APPEAL FROM A RULING OF LAW BY THE
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

**MOTION FOR RESERVATION AND REPORT TO THE FULL COURT
and
TO CONSOLIDATE WITH A PENDING APPEAL THAT RAISES THE
IDENTICAL ISSUE REGARDING THE SCOPE OF FEDERAL PREEMPTION**

AT&T Communications of New England, Inc., ("AT&T")
respectfully requests that the Single Justice of the
Supreme Judicial Court, Suffolk County: (i) without
deciding this matter, reserve and report to the full
Supreme Judicial Court the question of law raised by
AT&T's petition for appeal from an order issued by the
Department of Telecommunications and Energy (the
"Department"); and (ii) order that this appeal be
consolidated with AT&T's pending appeal in Docket
SJ-04-0075, which was reserved and reported to the full

court on January 3, 2005, and which raises the same legal question that is at issue in this case. AT&T brings this motion pursuant to G.L. c. 211 § 6, G.L. c. 231 § 112, Mass.R.Civ.P. 64, and Mass.R.App.P. 5.

I. THE ISSUE RAISED IN THIS APPEAL IS IDENTICAL TO, AND SHOULD BE CONSOLIDATED WITH, THE ISSUE THAT THE SINGLE JUSTICE RESERVED AND REPORTED TO THE FULL COURT ON JANUARY 3, 2005, IN DOCKET SJ-04-0075.

This appeal concerns a ruling of law made by the Department in an order that it issued on December 15, 2004, No. D.T.E. 03-60 (the "December 15 Order"). The Department held, incorrectly, that it is preempted from regulating certain intrastate telecommunications services under Massachusetts law merely because the Federal Communications Commission (the "FCC") has chosen not to regulate those services under federal law.

The exact same preemption issue has been raised in a pending appeal that recently was reserved and reported to the full Supreme Judicial Court. On February 19, 2004, AT&T filed an appeal of an order of the Department issued on January 30, 2004, numbered D.T.E. 98-57 Phase III-D (the "Phase III-D Order"). AT&T's appeal was docketed in the Supreme Judicial Court for Suffolk County as No. SJ-04-0075. On January 3, 2005, Justice Spina issued a Reservation and Report referring AT&T's appeal and the

Department's motion to dismiss in Docket No. SJ-04-0075 to the full court for decision.

The issue raised by AT&T's appeal in Docket No. SJ-04-0075 is identical to the issue raised in the instant appeal, to wit:

whether the Department erred in holding that its broad power to regulate certain intrastate telecommunications services under Massachusetts law has been preempted merely because the Federal Communications Commission (the "FCC") opted not to regulate such services under federal law.

A copy of AT&T's appeal in Docket No. SJ-04-0075 is attached hereto as Exhibit A. A copy of AT&T's Motion to Reserve and Report in Docket No. SJ-04-0075 is attached as Exhibit B.

In both cases, the Department found that it could not even consider whether to exercise its independent authority under Massachusetts law to require Verizon to provide to competitive local exchange carriers ("CLECs") unbundled access to certain network elements, on the mistaken ground that its authority to do so had been preempted by federal law.

Because this appeal and the appeal docketed as No. SJ-04-0075 ask the Court to address the same question of law, it would be most efficient for the two appeals to be consolidated for briefing, argument, and decision.

II. THIS APPEAL CONCERNS AN ISSUE OF LAW OF SUBSTANTIAL PUBLIC IMPORTANCE, APPROPRIATE FOR DECISION BY THE FULL COURT.

As was true of the appeal docketed as SJ-04-0075, the Department's holding in docket D.T.E. 03-60 that the broad powers delegated to it by the Massachusetts Legislature have been preempted by federal law concerns a matter of substantial public importance. It is an issue that may appropriately be reserved and reported to the full Court, as this appeal does not require any finding of facts.

The Department's ability to promote the development of local exchange competition, and to protect the interests of Massachusetts consumers, could be severely limited if the Department had no power to impose any regulatory requirements in addition to those established by the FCC under federal law.

III. THERE IS A PROBABLE GROUND FOR APPEAL, SINCE FEDERAL LAW DOES NOT PROHIBIT THE DEPARTMENT FROM ADOPTING ADDITIONAL INTERCONNECTION REQUIREMENTS TO PROMOTE LOCAL COMPETITION.

There is a probable ground for appeal in this matter, which makes it fit for judicial inquiry by the full Supreme Judicial Court.

Quite simply, the FCC's decision not to require incumbent local exchange carriers like Verizon to provide unbundled access to certain "unbundled network elements"

under federal law does not operate to preempt the Department's power to impose such requirements under Massachusetts law. The Department's ruling of law that its power in this area has been preempted is in error.

In the realm of federal preemption, one must "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." Roberts v. Southwestern Bell Mobile Systems, Inc., 429 Mass. 478, 486 (1999). In the field of telecommunications, Congress has made clear its intent not to preempt state rules that go beyond the minimum requirements established in federal rules.

The Telecommunications Act of 1996 (the "TCA") expressly authorizes States to impose additional requirements upon incumbent local exchange carriers ("ILECs") like Verizon so long as those requirements are "not inconsistent with" federal rules. See 47 U.S.C. §§ 251(d)(3), 261(c). Thus, the TCA does not "occupy the field." Roberts, 429 Mass. at 487. To the contrary, the TCA expressly authorizes states "to implement additional requirements that would foster local interconnection and competition." Michigan Bell Telephone Co. v. MCIMetro Access Transmission Services, Inc., 323 F.3d 348, 358

(6th Cir. 2003). Congress intended the TCA "[t]o promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." Preamble, Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

Under these circumstances, federal rules established by the FCC only set the regulatory floor, and the Department retains the power to impose additional requirements under Massachusetts law. See, e.g., Goodrow v. Lane Bryant, Inc., 432 Mass. 165, 170-171 (2000). See also, e.g., Atherton v. FDIC, 519 U.S. 213, 227-228, 117 S.Ct. 666, 674-675 (1997) (federal statute imposing minimum requirements establishes a "floor," which does not preempt State imposition of additional requirements); California Federal Savings and Loan Ass'n v. Guerra, 479 U.S. 272, 284-285, 107 S.Ct. 683, 691 (1987) (same); Tri-Nel Management, Inc. v. Board of Health of Barnstable, 433 Mass. 217, 222-224 (2001) (local ban on smoking which imposed limitations in addition to those in state statute was "not inconsistent with," furthered the intent of, and thus not preempted by the state rules).

As courts in three neighboring states have held, state public utility commissions like the Department remain free to impose unbundling, interconnection, or other obligations that go beyond federal requirements, and doing so is entirely consistent with the federal scheme and congressional intent to promote the development of local exchange competition. Petition of Verizon New England, Inc., 795 A.2d 1196, 1200 (Vt. 2002) (holding that Public Service Board's power under Vermont law to order Verizon to combine unbundled network elements was not preempted even if FCC had declined to order such combinations under federal law); Verizon New England, Inc. v. Rhode Island Public Utilities Comm'n, 822 A.2d 187, 193 (R.I. 2003) (holding that Public Utilities Commission was not preempted from regulating voice messaging services ["VMS"] under Rhode Island law as a result of the FCC's finding that under federal law VMS are information services not subject to regulation); Southern New England Telephone v. Department of Public Utility Control, 261 Conn. 1, 35, 803 A.2d 879, 900 (2002) (holding that Department of Public Utility Control's power under Connecticut to regulate the terms and conditions under which ILEC must offer certain "enhanced services" for resale was not preempted, despite ILEC's

claim that it had no obligation to make such an offering under federal law).

There is no conflict between state and federal law, and thus no preemption under the TCA, when it is possible to comply simultaneously with both sets of regulations.

E.g., Arthur D. Little, Inc. v. Comm'r of Health and Hospitals of Cambridge, 395 Mass. 535, 550 (1985);

Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S.

132, 142-43, 83 S.Ct. 1210, 1218, 10 L.Ed.2d 248 (1963).

For there to be conflict preemption, "there must be more than mere difference between the state and federal

regulatory systems; rather, compliance with the two must be a 'physical impossibility.'" Motor Vehicle Mfrs.

Ass'n of U.S., Inc. v. Abrams, 899 F.2d 1315, 1322 (2nd

Cir. 1990) (quoting Florida Lime, 373 U.S. at 143). No

"physical impossibility" would be created if the FCC

tells Verizon that under federal law it need not do

something, but the Department rules under Massachusetts

law that Verizon must do it after all.

Conclusion

For the reasons stated above, AT&T respectfully urges the Single Justice: (i) to reserve and report to the full Supreme Judicial Court the important question of law raised by this appeal; and (ii) to consolidate this

appeal with the appeal pending in Docket No. SJ-04-0075
or, alternatively, refer this motion to the full Supreme
Judicial Court for decision.

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January 26, 2005